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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

ALLIANCE FOR THE WILD ROCKIES, NATIVE ECOSYSTEMS COUNCIL, Plaintiffs, vs. LEANNE MARTEN, et al., Defendants.	CV-17-21-DLC REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Exhibit B: Kosterman Megan K. "Correlates of Canada Lynx Reproductive Success in Northwestern Montana" (2014). Theses, Dissertations, Professional Papers. Paper 4363. University of Montana, Missoula.

Exhibit C: *Lane County Audubon Society v. Jamison*, CV-91-6123-JO , Order (D. Or. Jan. 27, 1993)

Exhibit D: Hart et al (2015). "Area burned in the western United States is unaffected by recent mountain pine beetle outbreaks." Proceedings of the National Academy of Sciences Vol. 112; No. 14: 4375-4380 (April 7, 2015)

Exhibit E: Vanbianchi et al (2017). "Canada lynx use of burned areas: Conservation implications of changing fire regimes." Ecology and Evolution: 2017; 1-13.

Exhibit F: Brown et al (2004). "Forest Restoration and Fire: Principles in the Context of Place." Conservation Biology Vol. 18; No. 4; 903-912 (August 2004)

I. REPLY

A. Lynx require landscape-level planning.

After years of litigation, FWS listed the Canada lynx as a threatened species under the ESA in 2000. 65 Fed.Reg. 16052,16061 (March 24, 2000). The listing rule states: "we conclude the factor threatening lynx is the inadequacy of existing regulatory mechanisms, specifically the lack of guidance for conservation of lynx and lynx habitat in Federal land management plans []. A substantial number of the primary areas of lynx occurrence are on Federal lands [] where programs, practices and *activities allowed by current plans may cumulatively impact lynx*." *Id*. at 16067 (internal references omitted)(emphasis added). Furthermore, the listing rule states: "A substantial amount of the primary areas of lynx occurrence is on National Forest Service lands" including 67 percent of lynx habitat in the Northern Rockies. *Id.* at 16078. Morever: "the Northern Rockies/Cascades Region is *the primary region necessary to support the continued long-term existence* of the contiguous United States [lynx population]." *Id.* at 16066 (emphasis added).

In the listing rule, FWS states that there are "15 criteria that contribute to some level of adverse effects to either an individual lynx or a population segment." *Id.* at 16079. Although "[i]ndividually, these criteria may not impart substantial impacts on the [lynx population], [] current Plans do allow *actions that cumulatively could result in* *significant detrimental effects* to the [lynx population]." *Id.* (emphasis added). The listing rules states that "[b]ecause the Forest Service and BLM manage a substantial amount of lynx forest types in the contiguous United States, particularly in the West, it is imperative that lynx habitat and habitat for lynx prey be maintained and conserved on Federal lands." *Id.*

For this reason, the Northern Rockies Lynx Management Direction was proposed as a landscape level program to avoid significant, detrimental cumulative effects to the lynx population. The Lynx Amendment's 2007 Biological Opinion concedes that "rarity and large home ranges [of lynx] make it essential to develop and apply broad, landscape-level approaches . . . ." D-1292a: 77982. FWS also concedes: "[Forest] Plan amendments . . . are necessary for long-term conservation . . . . *Without programmatic guidance* and planning to conserve lynx, assessment of land management effects to lynx and development of appropriate conservation *strategies are left to project specific analyses without consideration for larger landscape patterns*." D-1292a: 77987 (emphases added).

The Ninth Circuit has now held that the 2007 landscape level Biological Opinion for the Lynx Amendment is inadequate because it does not address lynx critical habitat on National Forest lands. *Cottonwood Envtl. Law Ctr. v. USFS.,* 789 F.3d 1075, 1092 (9th Cir.2015). The Forest Service's attempt to move forward with thousands of acres of logging and burning in lynx critical habitat in this Project area completely ignores the reason that lynx were listed under the ESA. The Forest Service is moving forward with tunnel vision - logging and burning thousands of acres of lynx critical habitat without referring back to a landscape level plan that ensures adequate conservation of lynx critical habitat.

Thus, this Court was correct in *Marten* to hold: "*the Project's consultation requires incorporation of a programmatic analysis*. Incorporation of a programmatic Lynx Amendment consultation will be lawful, however, only after the reinitiated consultation on the Lynx Amendment has been completed." *Alliance for the Wild Rockies v. Marten*, No. CV-15-99-M-BMM, 2016 WL 6901264 at *6 (D.Mont. Nov. 22, 2016)(emphasis added). This Court's opinion in *Marten* is also consistent with the Ninth Circuit's opinion in *Lane County Audubon*: "[t]he impact of each individual [timber] sale on owl habitat cannot be measured without reference to the management criteria established in the [Timber Management Plans] and the Jamison Strategy. . . until consultation is satisfactorily concluded with respect to the Jamison Strategy, or indeed any other conservation strategy intended to establish the criteria under which sites for [timber] sales are to be selected, the [timber] sales cannot lawfully go forward." *Lane Cnty. Audubon Soc. v. Jamison*, 958 F.2d 290, 292, 294 (9th Cir.1992).

Likewise, the *Marten* opinion echoes the concerns in *Portland Audubon Society*:

"This court cannot evaluate the risks that particular timber sales pose to the survival of the northern spotted owl subspecies when the BLM has no plan that addresses the survival of the northern spotted owl subspecies." *Portland Audubon Soc. v. Lujan*, 795 F.Supp. 1489,1508–09 (D. Or.1992), *aff'd sub nom. Portland Audubon Soc. v. Babbitt*, 998 F.2d 705 (9th Cir. 1993).

B. The public interest and balance of the equities tip sharply in Plaintiffs' favor by law.

The Forest Service argues that "the ESA intrudes on the traditional four-factor test for emergency relief, if at all, only where an agency risks jeopardy of listed species or destruction of the species' critical habitat." Response at 23. To the contrary, "courts do not have discretion to balance the parties' competing interests in ESA cases" because "the 'language, history, and structure' of the ESA, [], remove several factors in the four-factor test from a court's equitable jurisdiction . . . ." *Cottonwood*, 789 F.3d at 1090-1091. There is no prerequisite for a plaintiff to establish jeopardy or destruction of critical habitat, especially in cases in which the claim is a procedural claim that necessary consultation has not yet occurred.

Under *Cottonwood*, in cases alleging ESA Section 7 procedural consultation claims, "when evaluating a request for injunctive relief to remedy an ESA procedural violation, *the equities and public interest factors always tip in favor of the protected* *species*. . . . That fundamental principle remains intact and will continue to guide district courts when confronted with requests for injunctive relief in ESA cases." *Id.* (emphasis added). This holding is unequivocal and has been followed by this Court: "[*Cottonwood*] did not affect the Supreme Court's holding that the equities and public interest factors always tip in favor of the protected species." *Marten*, 2016 WL 6901264 at *6.

The Ninth Circuit also recently re-emphasized the fact that the injunctive relief standard is always different in ESA cases: "For alleged ESA violations*, the traditional preliminary injunction standard does not apply*. [] Rather, Plaintiffs must only show they have or will suffer an irreparable injury to obtain injunctive relief." *Alliance for the Wild Rockies v. Christensen*, 663 Fed.Appx. 515, 517 (9th Cir. 2016) (citations omitted)(emphasis added).

C. Cutting down and removing trees across hundreds of acres in the Project area is irreparable harm to Plaintiffs' members' interests.

Reversing this Court, the Ninth Circuit held in *Alliance for the Wild Rockies v. Cottrell* that a logging project that "prevent[s] the use and enjoyment by AWR members of 1,652 acres of the forest" "satisfies the 'likelihood of irreparable injury' requirement articulated in *Winter*." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)(citations omitted). On remand, this Court clarified that "[t]he irreparable injury to which Plaintiffs are exposed is the loss of use and enjoyment of forested federal land due to logging." *Alliance for the Wild Rockies v. Cottrell*, CV-09-107-M-DWM, Doc. 82 at 8 (August 3, 2011). As set forth more fully in Plaintiffs' opening brief, at least four other orders issued in 2016 reach the same conclusion:

- *Christensen,* 663 Fed.Appx at 517 (9th Cir. 2016);
- *Alliance for the Wild Rockies v. Savage*, 2016 WL 4800870, at *1 (9th Cir. 2016);
- *Alliance for the Wild Rockies v. Marten*, 200 F.Supp.3d 1110, 1112 (D. Mont. 2016); and
- *Marten*, 2016 WL 6901264 at *6 (D. Mont. 2016).

As the Ninth Circuit reaffirmed in *Cottonwood*, "establishing irreparable injury should not be an onerous task for plaintiffs." 789 F.3d at 1090-91. That non-onerous test is satisfied here because Plaintiffs have demonstrated that a "specific project[] will likely cause irreparable damage to its members' interests." *Id.* at 1092; Declaration of Michael Garrity ¶9 (April 13, 2017).

Moreover, due to the agency's contention that the Garrity Declaration is "emaciated," Response at 7, Plaintiffs provide additional information in the Second Garrity Declaration:

Logging is not beneficial to lynx. Lynx are very sensitive to logging and

> are known to avoid openings and clearcuts. They need dense forest for denning, feeding, and reproduction. . . . Montana lynx "winter habitat" only consists of older multistoried forests . . . . The logging of forests will take over 100 years to regain lynx winter habitat. Additionally, there is no support for the agency's claims that logging will create lynx habitat. This would require the development of very dense conifer understories in the hundreds of acres to be logged. The agency provided no data to demonstrate that this dense regeneration will in fact occur. . . .

Second Declaration of Michael Garrity ¶11 (May 9, 2017). These concerns were laid out more fully in the administrative proceedings for this Project. *See e.g.* I-02: 87424-87430, 87438-87439.

The district court opinion cited by the Forest Service does not require a different conclusion. Response at 7 (*citing All. for the Wild Rockies v. Kruger*, 35 F.Supp.3d 1259, 1268-69 (D. Mont. 2014))[1]. *Kruger* states: "While injury to the plaintiff is a critical element of standing, [], which is not disputed here, it is not sufficient to satisfy the element of irreparable harm in the context of ESA-based injunctions." *Kruger*, 35 F.Supp.3d at 1269 (standing citation omitted). The Ninth Circuit rejected this finding the following year in *Cottonwood*, when it held that the irreparable injury requirement would be satisfied on remand if Plaintiffs "make an evidentiary showing that specific projects will likely cause *irreparable damage to its members' interests*." *Cottonwood*,

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[1]Contrary to the agency's implication, Response at 7, the cited *Kruger* opinion, which denied a motion for injunction pending appeal, was not appealed to the Ninth Circuit and therefore could not have been affirmed. *See* FRAP 8.

789 F.3d at 1092 (emphasis added). Moreover, contrary to the implication in *Kruger* that *Cottrell* does not apply to ESA claims, *see* 35 F.Supp.3d at 1269, in *Christensen*, the Ninth Circuit expressly cited and quoted *Cottrell* in its analysis of irreparable injury in the context of an ESA Section 7 violation, 663 Fed.Appx at 517 (*quoting Cottrell*).

Furthermore, the Forest Service fails to disclose the procedural context of *Kruger*; this Court did in fact grant an injunction against the challenged project in its original summary judgment opinion due to a meritorious ESA consultation claim for lynx. *All. for Wild Rockies v. Kruger*, 950 F.Supp.2d 1172, 1196 (D.Mont. 2013) ("Defendants are ENJOINED from implementing the Cabin Gulch Project").

Finally, the standard for injunctive relief is not "irreparable harm to lynx as a species. . . ." *See* Response at 8. The agency ignores the Ninth Circuit's admonition that in ESA cases, "establishing irreparable injury should not be an onerous task for plaintiffs." *Cottonwood*, 789 F.3d at 1092. Creating a new standard that requires scientific certainty that a single site-specific project would irreparably harm an entire population of a wide-ranging species would be an incredibly onerous task for public interest plaintiffs, and would all but guarantee that an injunction would never issue for an individual site-specific project. The result would be death by a thousand cuts - especially for lynx, a species for which cumulative effects are a significant concern. A standard that makes it almost impossible to receive a preliminary injunction does not comport with the Ninth Circuit's admonition that the policy of "institutionalized caution" must "guide district courts when confronted with requests for injunctive relief in ESA cases." *Id* at 1088-1092.

D. The timber sales with site-specific consultation in *Lane County Audubon* were enjoined.

The Forest Service argues that the *Lane County* "opinion did not address timber sales the agency had announced in 1991 for which FWS had already issued a Biological Opinion." Response at 20. This statement is false. In *Lane County,* there were 174 timber sales from 1991 at issue; FWS had reached a no jeopardy opinion (i.e. concurrence) for 122 timber sales and a jeopardy opinion (i.e. biological opinion) for 52 timber sales. 958 F.2d at 292. The Ninth Circuit held: "We remand to the district court for reconsideration of whether the award of those sales should also be enjoined based upon our holding today." *Id.*

On remand, the district court addressed the fact that a companion case had already enjoined the 1991 timber sales challenged in *Lane County*: "The permanent injunction ordered in the *Portland Audubon Society* case prevents the BLM from offering or awarding any 1991 BLM timber sale in suitable spotted owl habitat or that may affect the owl. . . .The enjoined sales include sales remanded to this court for further consideration . . . ." *Lane County Audubon Society v. Jamison*, CV-91-6123-

JO, Order at 4 (D.Or. Jan. 27, 1993)(attached as Exhibit C).

In the *Portland Audubon Society* case that enjoined the 1991 timber sales, the District of Oregon explained its rationale for enjoining timber sales despite their completed site-specific analyses:

> The BLM asserts that 78 of these 82 timber sales found to create no jeopardy to the northern spotted owl subspecies should go forward.
>
> This court cannot evaluate the risks that particular timber sales pose to the survival of the northern spotted owl subspecies using the existing Timber Management Plans which do not . . .contain any plan for long-range management of the northern spotted owl subspecies on BLM lands.

795 F.Supp. at 1508–09.

E. The Court should reject the agency's fear-based rhetoric and manufactured sense of urgency.

1. The fact that the trees in this Project area have been dead for over seven years undermines the argument that logging is urgently needed.

The Forest Service argues: "Granting Plaintiffs' requested injunction will delay treatments for another year . . . This will leave the forest and community vulnerable to a large wildfire event that is both resistant to control efforts, more dangerous to firefighters, and significantly more damaging." Response at 5.

The mountain pine beetle epidemic in the Project area peaked in 2009. F-7: 84095. On January 6, 2010, the Forest Service proposed logging in the Stonewall Project area and noted that "large-scale mountain pine beetle epidemic has killed most of the mature lodgepole pine and ponderosa pine. These conditions are elevating fuel levels which pose a wildfire threat to nearby homes and communities in the wildland urban interface (WUI)." A-1: 000002. Thus, the trees in the Project area have been dead since at least 2010 and therefore any resulting threat of wildfire has existed every year since at least 2010. The fact that the Forest Service has voluntarily waited *over seven years* to begin implementation of the Project undermines any purported urgency in logging this Project area. *See Cottrell*, 632 F.3d at 1137 (Forest Service's own self-imposed delay undermines agency argument that there is an emergency).

2. Beetle-killed trees do not create a greater risk of wildfire.

The Forest Service represents that the "large-scale mountain pine-beetle epidemic has killed most of the mature lodgepole pine and ponderosa pine in the Project area. These events have caused . . . elevated fuel levels that increase the risk of a large wildland fire event, threatening homes in nearby Lincoln and jeopardizing firefighter safety." Response at 1. The scientific literature rebuts this assumption:

> Contrary to the expectation that an MPB outbreak increases fire risk, spatial overlay analysis shows *no effect of outbreaks on subsequent area burned* during years of extreme burning across the West. *These results refute the assumption that increased bark beetle activity has increased area burned* . . . .

Exhibit D at 1 (emphases added).

3. Wildfire does not destroy lynx habitat.

The agency also represents that wildfire would "endanger[] the very ecosystems that Plaintiffs want to protect." Response at 5. To the contrary, if there was a wildfire, post-wildfire forest still provides important wildlife habitat: "the heterogeneous habitat created by burns provides lynx with more varied habitats to suit their survival needs than areas disturbed by timber harvest . . . ." Exhibit E at 11. Moreover, "[l]ynx used burned areas as early as 1 year postfire, which is much earlier than the 2–4 decades postfire previously thought for this predator." Exhibit E at 1.

4. Stand-replacing wildfires are natural, and logging many miles from homes will not protect homes from wildfire.

The Forest Service argues that the Project "will reduce the risk to the community of Lincoln from high-intensity wildfires while reestablishing low-intensity burns as part of the natural forest management process." Response at 4. The implication or representation is that the forest is "unnatural" or "unhealthy." To the contrary, "[t]he project area is heavily dominated by subalpine habitat types which cover about 69 percent of the area." F-7: 84175. The published literature states that subalpine fir forests "have long fire return intervals . . . At periods averaging a few hundred years, extreme drought conditions would prime these forests for large, severe fires that would tend to set the forest back to an early successional stage, with a large carry-over of dead trees as a legacy of snags and logs in the regenerating forest." Exhibit F at 6. In these forests, "natural ecological dynamics are largely preserved because fire suppression has been effective for less than one natural fire cycle. . . . Efforts to manipulate stand structures to reduce fire hazard will not only be of limited effectiveness [] but may also move systems away from pre-1850 conditions to the detriment of wildlife and watersheds." Exhibit F at 6-7.

Furthermore, the Project area is located four miles away from Lincoln. F-7: 84030. Logging in selected units four miles away from Lincoln will not protect homes in Lincoln from wildfire; the Forest Service's own research finds that "home ignitions depend on the home materials and only those flammables within a few tens of meters of the home (home ignitability). The wildland fuel characteristics beyond the home site have little if any significance to WUI home fire losses." D-216: 28346-28347.

F. Plaintiffs have standing.

In its irreparable harm argument, the agency appears to argue that Plaintiffs do not have standing. Response at 7. The agency then asserts, without any evidence, that it is a "fact that Mr. Garrity has never visited this area. . . ." Response at 8. To the contrary, the reason that Mr. Garrity's past visits to the Project area were not detailed in his first declaration was because past visits are not considered in the standing inquiry; instead, plaintiffs must provide concrete plans for future visits to a specific timber sale project area. *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009)(standing declaration is insufficient if "it relates to past injury rather than imminent future injury that is sought to be enjoined"). The declaration satisfies this requirement to set forth a plan to visit the project area in the future. Garrity Declaration ¶5.

Nonetheless, in order to disprove the agency's proffered "alternative" "fact that Mr. Garrity has never visited this area," Response at 8, Mr. Garrity has filed a second declaration that clarifies that he has visited the Project area multiple times in the past: "As a fifth generation Montanan, I have driven through the Stonewall Project Area, which extends to and crosses Highway 200, innumerable times. I have also taken an extended horseback trip in the area. Most recently, in the summer of 2014, I took an extended visit to the area with my children, and we drove and hiked all around the Stonewall Project area." Second Garrity Declaration ¶10.

IV. CONCLUSION

For all of the reasons discussed above, Plaintiffs respectfully request that the Court preliminarily enjoin implementation of the Stonewall Project to maintain the status quo until this Court issues a final decision on the merits of this case. The agency's voluntary, self-imposed, seven-year delay in implementing this Project undermines any argument that this Project must be immediately implemented.

Respectfully submitted this 11th Day of May, 2017.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 3,247 words, excluding the caption, table of contents, table of authorities, index of exhibits, signature blocks, and certificate of compliance.

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